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In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 1228

LAWRENCE W. MEDLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 353 F. 2d 789.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1965. A petition for rehearing was denied on February 17, 1966. By order of Mr. Justice Stewart, the time for filing a petition for a writ of

certiorari was extended to and including April 18, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motions for a continuance.

2. Whether the government attorney's rebuttal argument, directed as a reply to the closing argument of petitioner's counsel, constituted plain error.

3. Whether the district court's supplemental instructions on reasonable doubt constituted plain error.

4. Whether the district court abused its discretion in denying petitioner's motions for a mistrial and for a new trial, both of which were based on the contention that he had been inadequately represented by counsel.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Middle District of Tennessee, on an indictment charging that he offered a federal petit juror $10,000 to vote for the acquittal of James R. Hoffa in a 1962 trial, in violation of 18 U.S.C. 1503. Petitioner was sentenced to eighteen months' imprisonment. The court of appeals unanimously affirmed. The sufficiency of the evidence, which is not in issue in this Court, is reviewed in the opinion below (Pet. App. 7A-10A).

1. Petitioner was originally one of a number of defendants named in a five-count indictment charging endeavors to obstruct justice in the 1962 trial of James R. Hoffa in the Middle District of Tennessee. In July 1963, two months after the return of the indictment (D.A. 4a),[1] the co-defendants, later joined by petitioner, filed a motion for a change of venue from Nashville on the basis of local newspaper publicity (G.A. 1b). The motion was denied (G.A. 1b-2b). Thereafter, it was publicly disclosed that Z. T. Osborn, Jr., an attorney representing petitioner's co-defendant Hoffa, had been involved in an attempted bribe of a juror in the prospective trial. In December 1963, the co-defendants, relying primarily on the Osborn incident, renewed their motions for a change of venue and for a continuance (G.A. 2b). At argument on the latter motions, petitioner sought to withdraw his participation in the motion for a change of venue and asked instead for a continuance on the basis of his counsel's workload and the Nashville publicity. On December 28, 1964, the court declined petitioner's request and granted a transfer of the case against all defendants to the Eastern District of Tennessee for trial in Chattanooga on January 20, 1964 (D.A. 9a-11a). In a supporting opinion, the court noted the front-page publicity then appearing daily in the two Nashville newspapers, and observed that, while it might ordinarily reserve its ruling until

[1] "D.A." refers to petitioner's printed appendix in the court of appeals. "G.A." refers to the government's printed appendix in that court.

after the *voir dire* examination of the jury panel, it had decided to grant the motion in order to avoid a "possible substantial delay" in the trial and to remove "any cloud of possible error" (D.A. 5a-9a). On January 17, 1964, the court of appeals, on application of petitioner, directed that the order transferring the case be vacated as to petitioner only. The complying order of the district court on January 20, 1964 (G.A. 2b; D.A. 12a), had the effect of granting petitioner a severance and a continuance.

On March 16, 1964, after the conviction of the other defendants in Chattanooga, petitioner's trial was set for March 30, 1964 (D.A. 13a). On March 25, petitioner filed a motion for a continuance on the ground that allegedly prejudicial press, radio, and television publicity in the Nashville area since 1962 had rendered a fair trial impossible, and on the further ground that his counsel had a heavy trial schedule for the period during which the trial had been set (D.A. 14a-20a). In an order denying the motion, the court noted (D.A. 22a-23a):

> With regard to the first ground of the motion, the Court has carefully read and considered the motion and all exhibits filed therewith, including all newspaper accounts and other publicity made a part of the exhibits. Much of this publicity has no reference whatsoever to the defendant, Medlin. Only a very small part of it makes any specific reference to him or to matters that might properly be considered relevant to his case. Moreover, whether such publicity has in any manner prejudiced said defendant in obtain-

> ing a trial by a fair and impartial jury can better be determined upon the *voir dire* examination of the jury.

A further motion for a continuance was filed, argued and denied on March 30, 1964, the first day of trial.

Voir dire of prospective jurors began March 30, 1964, over ten months after the return of the indictment and three months after the transfer from Nashville of the case against the six original co-defendants. Members of the panel had been subpoenaed only a week before (G.A. 3b, 17b, 32b). They were instructed and examined in groups by the court, and were then examined individually, out of the presence of the others, by counsel for the government and counsel for the defense. As each group of prospective jurors was called for examination, the court informed them of the nature of the charge and asked them, *inter alia*, if they had ever talked to anyone who had purported to know the facts of the case; if they had heard or read anything that would cause them to form any opinion as to petitioner's guilt or innocence of the matter charged; if they had ever formed any opinion as to petitioner's guilt or innocence; if they had any prejudice against or sympathy for the government or petitioner; and if they knew of any reason why they could not try the case solely on the evidence presented in court (G.A. 6b-7b, 21b-22b, 28b, 33b-34b, 37b, 40b-41b). Of the 35 potential jurors so examined by the court, none answered any of these questions affirmatively. After further *voir dire* by both counsel, petitioner's attorney indicated to the

court that in light of his motion for a continuance he was surprised by the small number of panel members who had read much about the case (G.A. 26b-27b), and by the lack of necessity to challenge jurors for cause (G.A. 39b). At the end of two days of *voir dire* examination, no panel member had been challenged for cause on the ground that he was biased or had been influenced by publicity. Of the twelve jurors and two alternates finally impaneled, only two said that they had read anything concerning petitioner at all (G.A. 17b, 29b-30b), and a third was shown only to have heard petitioner's name mentioned on television (G.A. 14b). No juror expressed any doubt of his ability to try the case solely on the evidence presented at trial.

2. In the course of closing argument, petitioner's counsel referred to "the Hoffa hysteria hit[ting] the Federal Government," and the resulting "terrible war between two fanatical giants * * *, each intent on the destruction of the other." He then characterized petitioner as an innocent victim of that war (G.A. 78b). He emphasized the testimony concerning petitioner's previous good reputation, and argued that if petitioner were "the type of person capable of committing the offense charged" the various character witnesses would not have testified as they did (G.A. 85b). He stated (G.A. 78b):

> I sincerely believe with all my heart he is entitled under the evidence presented to this court and jury to be acquitted and to have this terrible burden removed and the stigma of this recklessly-brought indictment erased from his name.

He further stated that the government attorney "is wrong, dead wrong if he thinks this evidence justifies a conviction of Medlin" (G.A. 83b).

In rebuttal, government counsel prefaced his remarks by admonishing the jury that "if you are not convinced beyond a reasonable doubt that this man is guilty, turn him loose," and added, "if you are convinced" that the crime was committed, "it is your sworn duty" to return a finding of guilty (G.A. 86b). He then argued that "this is not a war as [the defense attorney] with considerable eloquence said between Kennedy and Hoffa", but "a war against tampering with justice" in which the jurors were "called on now to say which side [they] stand on" (G.A. 87b). He argued (G.A. 87b):

> [I]f jury fixing is to be tolerated in this country you might as well tear down this beautiful flag now with its 50 stars and stomp it into the ground and then go home and burn your houses up.

With regard to the evidence of petitioner's previous good character, government counsel argued that "it is a bad thing for a man of good character to get in trouble" but "unfortunate as it is, men who can show good character frequently commit offenses", citing Benedict Arnold and Judas Iscariot as illustrative. He then noted that he would be violating his responsibility if he exhorted the jury to convict a man he believed to be innocent, and stated (D.A. 80a-81a):

> I wouldn't do that any more than I know that you wouldn't vote to convict a man that you

> thought was innocent. But I have the courage and I believe you have on these facts regardless of what sympathy you might have * * *.

Although objection was made to another part of government counsel's argument (D.A. 80a), none was made to the above portions.

In its instructions to the jury the trial court charged (G.A. 89b):

> Do not allow anything in the argument of the attorneys during the course of this trial to cause you to have any prejudice or any sympathy or to cause you to do anything other than to try this case on the evidence produced and upon the instructions of the Court.

3. After a period of deliberations, the jury asked for a review of the court's instructions on reasonable doubt. In response the court instructed (D.A. 83a), as it had done earlier (G.A. 88b):

> [A] reasonable doubt is a fair doubt based upon reason and common sense and arising out of the state of the evidence. * * *
>
> A reasonable doubt would exist in the case when, after fair and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt as charged. * * * [The government has to prove its case] only so as to leave no reasonable doubt of the defendant's guilt in the minds of the jury. It is not required that the government should exclude all doubt, but only to exclude reasonable doubt. If there should be evidence in the case that has created a reasonable doubt in your minds as to the guilt of the defendant, then the

> case is not made out beyond a reasonable doubt. But if there is no reasonable ground for doubting the defendant's guilt, then the case was made out beyond a reasonable doubt.

No objection was made to the language of the charge, either at the time it was originally given or when it was repeated in response to the jury's request.

4. In a motion for a mistrial made after the close of the defense case (D.A. 76a) and again in a motion for new trial, petitioner alleged, through his retained counsel, that counsel had been too tired during the trial to meet the minimum standards of adequate representation. The first motion was summarily denied. At a hearing on the latter motion, counsel produced evidence to the effect that on the day following the return of the verdict, counsel was hospitalized and slept for most of three days due to exhaustion (D.A. 85a-98a). The trial judge denied the motion, noting that he was "unable to discern any difference whatsoever in the advocacy and the ability and the earnestness, awareness, and conduct of the defendant's counsel throughout the trial and his presentation" at the hearing (G.A. 91b). On each occasion, the judge found, counsel conducted the defense with "thoroughness, with great skill and with great ability" (*ibid.*).

ARGUMENT

1. There was no abuse of discretion in the district court's denial of petitioner's motions for a continuance based on the existence of pretrial publicity. Although the Nashville publicity was found sufficient in

December 1963 to justify a transfer of the case against all defendants to Chattanooga, the trial judge specifically noted that his decision was made without the benefit of a *voir dire* examination of the prospective jurors in order to prevent a possible substantial delay, and that the matter was resolved in the defendants' favor so as to remove any possibility of error (D.A. 8a-9a). At the time of petitioner's motions the following March, the trial court noted that, in contrast to the daily publicity earlier given to the entire case and to Hoffa, its central figure, there had since appeared only a small amount of publicity concerning the case of petitioner (D.A. 22a). In any event, the real measure of the effect of that publicity, the *voir dire* examination, disclosed not a single instance where the news coverage caused a potential juror to form any opinion concerning the guilt or innocence of petitioner. Under the circumstances, petitioner failed to demonstrate that the denial of his motion resulted in any essential unfairness.[2] See *Beck* v. *Washington*, 369 U.S. 541, 558; *United States* v. *Bell*, 351 F. 2d 868, 875-877 (C.A. 6), certiorari denied, March 21, 1966, No. 961, this Term.

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[2] Petitioner's reliance on *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), as a case conflicting with the decision of the court below (Pet. 7, 11), is misplaced. *Delaney* concerned intense publicity which resulted from the fact that a committee of the House of Representatives continued to investigate the case after the indictment had been returned. The court observed that the publicity would have constituted prejudicial error if generated by the prosecution, and concluded that there was no difference whether the United States had acted through its legislative or its executive branch.

Similarly, there was no abuse of discretion in denying the motions on their alternate ground—that defense counsel had inadequate time to prepare for trial due to a heavy case schedule in March and April 1964. Counsel had been retained more than a year before January 20, 1964, the date of the scheduled trial in Chattanooga (G.A. 61b-62b, 71b). The severance of petitioner's case on that date in effect afforded him an additional continuance of more than two months. Denial of a further delay was entirely appropriate.

2. Petitioner's various challenges to government counsel's rebuttal argument were not made during the trial and cannot be first asserted on appeal from his conviction. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239. In any event, they are without merit. The references to the toleration of jury tampering were contained in passages urging, in substance, that if the evidence proved petitioner guilty, the jurors should set aside any possible sympathies or prejudices they might have and enter a finding of guilt. The references to Benedict Arnold and Judas Iscariot were not, as petitioner contends, attempts to characterize him as similar. They simply illustrated the proposition "that one who has theretofore borne a good reputation may commit a crime"—"that proof of a good reputation is not a complete defense"—an argument well within the bounds of propriety. *Ladrey* v. *United States*, 155 F. 2d 417, 419 (C.A. D.C.), certiorari denied, 329 U.S. 723. And government counsel's oblique suggestion that he believed petitioner guilty, expressly predicated "on

these facts" (D.A. 81a), was a reply to the direct expression of a contrary personal belief by petitioner's counsel (G.A. 78b). It was a permissible response. See *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15; *United States* v. *Kiamie*, 258 F. 2d 924, 934 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Battiato*, 204 F. 2d 717, 718-719 (C.A. 7), certiorari denied, 346 U.S. 871.[3] Moreover, any possibility of prejudice was minimized by the trial court's adomonition to the jury regarding the weight to be given to the arguments of counsel (G.A. 89b).

3. There is no merit to petitioner's assertion that the trial court's supplemental instruction failed to apprise the jury that a reasonable doubt might arise from a lack of evidence (Pet. 20-24). Although the court once referred to "evidence * * * that has created a reasonable doubt", it also mentioned that such doubt might arise out of the "state of the evidence" (D.A. 83a). Additionally, the jurors were specifically reminded that the government must prove its case "so as to leave no reasonable doubt," and that a reasonable doubt would exist if "after * * * consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt" (*ibid.*). The instruction implied no burden on the defendant

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[3] In *Greenberg* v. *United States*, 280 F. 2d 472 (C.A. 1), a case petitioner cites as conflicting with the decision below (Pet. 15), the prosecuting attorney directly expressed his belief in the defendant's guilt, the defense counsel objected, the trial judge ruled, in the presence of the jury, that the prosecutor had a right to argue "his belief in the evidence", and the argument was then repeated. 280 F. 2d at 474.

to offer evidence raising a doubt. See *Agnew* v. *United States*, 165 U.S. 36, 51; *United States* v. *Rinaldi*, 301 F. 2d 576, 578 (C.A. 2); *Ashe* v. *United States*, 288 F. 2d 725, 730 (C.A. 6); *Singer* v. *United States*, 278 Fed. 415, 418 (C.A. 3), certiorari denied, 258 U.S. 620. In any event, since petitioner made no objection to the charge on either of the occasions when it was given (G.A. 88b; D.A. 83a), he is not now in a position to complain. Rule 30, F.R. Crim. P.[4]

4. The district court properly rejected petitioner's motions for a mistrial and for a new trial based on the contention that he had been inadequately represented by counsel. Although testimony at the hearing disclosed that defense counsel was exhausted after trial and required hospitalization, his performance during trial was the only relevant consideration. That performance was found by the trial court to have been characterized by "thoroughness, * * * great skill and * * * great ability" (G.A. 91b). As noted by the court of appeals, the trial judge found explicitly that counsel manifested the same skill and ability during the trial as he showed in the post-trial hearing on his motion for a new trial—which took place after he was fully rested (Pet. App. A, 17A-18A). And petitioner's counsel made no suggestion below that he would have tried the case any differently had he not been fatigued, but only speculated that he might have objected to the government's rebuttal

[4] Moreover, the court expressly stated in an earlier portion of the charge that "reasonable doubt may arise not only from the evidence produced, but from a lack of evidence" (G.A. 88b).

argument and to the court's supplemental instruction (Pet. App. A, 19A). Under the circumstances, there was plainly no lack of effective representation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 217819 809